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No. 90-96

In The

Supreme Court of the United States

October Term, 1990

FREDERICK A. SIEGERT,

Petitioner,

v.

H. MELVYN GILLEY,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. In a *Bivens* claim for damages in which malice has been alleged and where qualified immunity has been raised as a defense, whether a "heightened pleading" standard which precludes limited discovery prior to disposition on a summary judgment motion violates applicable law?

2. In a *Bivens* claim for damages, whether a federal official can be qualifiedly immune from suit without regard to whether the challenged conduct was discretionary in nature?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The April 16, 1990 order of the United States Court of Appeals for the District of Columbia Circuit denying *en banc* review, with a concurring opinion (Wald, C.J.), and that court's April 16, 1990 order denying rehearing, with a dissenting statement (Wald, C.J.), are unreported and are printed in the appendix to the petition for certiorari (hereinafter referred to as "App.") at, respectively, App. 2a, 3a and 4a. The February 9, 1990 opinion and order of the court below reversing the trial court's denial of

respondent's summary judgment motion is reported at 895 F.2d 797 (D.C. Cir. 1990). App. 5a. The June 30, 1988 opinion and order of the trial court denying respondent's motion for reconsideration of its conditional denial of respondent's motion to dismiss or in the alternative for summary judgment, is reported at 692 F.Supp. 1408 (D.D.C. 1988). App. 27a. The trial court's December 3, 1987 opinion and order conditionally denying respondent's motion to dismiss or in the alternative for summary judgment, pending limited discovery, is unreported. App. 53a.

JURISDICTION

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULES INVOLVED

This case involves the following constitutional provision and federal rules: the Fifth Amendment to the United States Constitution and Rules 8, 9 and 56 of the Federal Rules of Civil Procedure. This provision and the rules are printed in the appendix to this brief.

STATEMENT OF THE CASE

Until defendant committed the act complained of in this case, plaintiff had received exemplary job performance ratings during his several years of employment at Saint Elizabeths Hospital. He was a psychologist there whose specialty was treating severely retarded children and adults and, for most of his employment from 1979 to 1985, he was the coordinator of the hospital's behavior modification division. J.A. 19, 20. Defendant, also a psychologist, became the supervisor of plaintiff's division, and was plaintiff's immediate supervisor, beginning in January 1985. J.A. 14, 20. From the start, the defendant, who had little training or experience in the field of behavior modification, clashed with plaintiff and others in the division because they resisted defendant's efforts to change certain aspects of that program which had been in operation for several years. J.A. 20.

In February 1985, plaintiff was injured by a patient which caused more grist for conflict between plaintiff and defendant. J.A. 20. Due to his injury, plaintiff took months of medical leave time away from work, a factor resented by defendant. J.A. 20. Most of that leave was erroneously noted as "A.W.O.L." and was initially logged as being noncompensable. Plaintiff was later compensated for all of that time. J.A. 19.

In the spring of 1985, plaintiff began to look for a new position because he knew that working with defendant would be professionally and personally impossible. In May of that year the Department of the Army notified him that he would be considered for vacancies in Europe as a psychologist, J.A. 20, and in August 1985, plaintiff

signed a 36-month contract to work as a clinical psychologist in the "Exceptional Family Member Program" at the Army hospital in Bremerhaven, West Germany. J.A. 20.

In late August or early September 1985 plaintiff was informed that he was going to be fired from Saint Elizabeths. Plaintiff believed that the reasons for the Hospital's proposed action were because he had been A.W.O.L. from his job, which was untrue, and because of professional disagreements with defendant. J.A. 21. Plaintiff was told that if he resigned from Saint Elizabeths a letter listing the reasons for the proposed removal, and information as to the fact of the proposed removal, would not be placed in his personnel file. J.A. 21. To "avoid a termination that might damage his reputation," App. 8a, "to protect his future job prospects," App. 33a, and since he was about to sign or had just signed a 36-month contract with the Army, plaintiff assented to the agreement. J.A. 21.

Pursuant to his agreement with Saint Elizabeths, he did resign from his job on October 1, 1985. Soon after, he began to work with mentally retarded children and with members of their families at the Army base hospital in Bremerhaven. J.A. 21.

On October 15, 1985, plaintiff signed a "Credential Information Request Form." App. 55a. "Credentials" are synonymous with "privileges" and are granted by each hospital's medical staff or board. If a person wants to practice a particular specialty, he or she must be granted particular privileges in conformity with that specialty's standards, such as educational requirements, years of

practice, and type and quality of supervision, as established by the hospital's board. App. 34a. Being credentialed in order to treat mentally retarded children, and being separately credentialed in order to work with adult members of their families, was a condition of plaintiff's employment with the Army. J.A. 22.

The Form authorized Saint Elizabeths to release to plaintiff's Army supervisor, Col. William R. Smith, "all information on job performance and the privileges granted while I [the plaintiff] was a member of your staff. . . ." App. 55a. It had been sent by Col. Smith to Eugene Stammeyer, Director of Psychology at Saint Elizabeths, J.A. 22, who channelled it to defendant as plaintiff's last supervisor at the Hospital. J.A. 14-15. Defendant failed to respond to any of the information which the Form specifically sought. Instead, on October 23, 1986, and wholly within the context of information about plaintiff's alleged A.W.O.L. status and his forced resignation, defendant wrote to Col. Smith that plaintiff was " . . . inept and unethical, perhaps the least trustworthy individual I have supervised in my thirteen years in this hospital."[1]

On November 27, 1985, and because of the information which had been provided by defendant, plaintiff learned that the Army would not recommend privileges for him to practice his specialty. J.A. 7, 22. During the next two years, plaintiff worked in the hospital's medical library and unsuccessfully tried to find another job in the

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[1] The government's request that the letter be filed under seal was granted by the district court in February 1987.

area of his specialty. For example, he was denied a psychologist position at the Army hospital in Stuttgart because of what they had "heard" about him from Bremerhaven personnel. J.A. 7, 22, 23. Alternately, he was allowed to practice his specialty at Bremerhaven, J.A. 22, but after losing the credentials that sporadically and provisionally had been granted by the Army during the credentials appeal process, plaintiff was terminated from federal employment in December 1987. He has not been able to find work in the public or private sectors since then which is comparable to what he had done for most of his professional career. J.A. 23.

On November 25, 1986, plaintiff filed a *Bivens*[2] action against defendant in the United States District Court for the District of Columbia. J.A. 4. In addition to several pendent claims, he alleged that his Fifth Amendment substantive due process guarantees had been violated as a result of defendant's malicious and intentional communication of a false and defamatory statement. Plaintiff also claimed that his professional reputation and his ability to earn a livelihood as a psychologist practicing in his field had been irreparably damaged as a result of defendant's act. J.A. 7-9.

Defendant filed a motion to dismiss or for summary judgment on February 5, 1987. Relying on *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and claiming a lack of a clearly established constitutional prohibition against the furnishing of a "reference" pursuant to a request from

[2] *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

plaintiff's new employer, defendant claimed he was qualifiedly immune from suit. Motion By Defendant to Dismiss Or In The Alternative For A Summary Judgment, at 11. Attached to the motion was a statement of material facts which defendant claimed were not in issue and an affidavit signed by Dr. Stammeyer. J.A. 12-16. Dr. Stammeyer defined what the Army had requested as a "reference . . . asking for information needed for credentialing, . . . " J.A. 15, and in the statement of material facts not in issue, defendant claimed he had responded to a "request for a reference," and that plaintiff had consented to the release of information "by employees of Saint Elizabeths Hospital concerning job performance." J.A. 12-13.

In opposition, plaintiff stated that it was "beyond the outer perimeters of defendant's job responsibilities to make false statements about employees, . . . " J.A. 17, and that he had "consented to the release of information . . . as to his credentialing status," J.A. 18, but not to information concerning job performance "by any of [Saint Elizabeths] employees. . . . " J.A. 18. He also argued that responding to a Credential Information Request Form was a "ministerial task." Memorandum Of Points and Authorities In Support Of Plaintiff's Opposition To Defendant's Motion To Dismiss or Alternatively For Summary Judgment, at 7. An affidavit was filed with his opposition. J.A. 19-24.

On December 3, 1987, the district court (Sporkin, J.) stated that it could not rule on defendant's summary judgment motion until depositions of the parties and of Col. Smith had taken place. App. 53a-54a. Consequently, it held defendant's motion in abeyance and invited

renewed motions at the conclusion of discovery. App. 54a. On December 15, 1987 defendant asked the court to reconsider its decision.

On June 30, 1988 the district court denied defendant's motion for reconsideration, "rejected his qualified immunity defense," and ordered the discovery which previously had been ordered to proceed to determine whether there were material facts – "if the information supplied by defendant is true, and the plaintiff is plainly incompetent and derelict" – which were genuinely in dispute. App. 52a. Consistent with the criteria in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Anderson v. Creighton*, 483 U.S. 635 (1987), and as particularized in *Doe v. United States Dep't. of Justice*, 758 F.2d 1092 (D.C.Cir 1985) and in *Bartel v. F.A.A.*, 725 F.2d 1403 (D.C.Cir. 1984), the court's denial was based on its determination that there were clearly established constitutional and statutory rights which plaintiff claimed had been violated contained in the idea that an "individual need not be permitted to intentionally or maliciously provide false information . . . in job references." App. 52a.

On February 9, 1990 the Court of Appeals reversed the denial of defendant's motion for reconsideration, vacated the lower court's discovery order and remanded the case with instructions that it be dismissed. App. 19a. The majority (Buckley, D.H. Ginsberg, JJ.) analyzed the case from two perspectives.[3] Objectively, it defined the

[3] Neither addressed plaintiff's allegations that defendant knowingly had made false statements.

right at issue by stressing that "the relevant question . . . is not whether Gilley misunderstood the nature of the information requested, but whether the constitutional right claimed by Siegert was so clearly established that a reasonable person would have known that a candid response to such an official inquiry might give rise to liability for damages." App. 16a. The majority considered the district court's definition of the right alleged insufficiently particularized to comport with *Anderson*, and it distinguished *Doe* and *Bartel* by the claim that neither case involved "a response by a government official to a request for information about a former employee from a prospective government employer." App. 15a. Under this analysis, the majority held that defendant's actions did not violate a right that was clearly established in October 1985. App. 16a.

Second, the majority determined that if plaintiff's assertions as to defendant's subjective intent could meet the circuit's heightened pleading requirements, defendant's bad faith "would suffice to make Gilley's actions in writing the letter a violation of Siegert's constitutional rights." App. 16a-17a. The majority found, however, that plaintiff's allegations contained only "innuendo," were too circumstantially pleaded, and failed to allege with "direct evidence" that "Gilley had acted in bad faith. . . ." App. 17a. Relying on *Hobson v. Wilson*, 737 F.2d 1 (D.C.Cir. 1984), it stated that "conclusory allegations of this sort will not suffice to subject government officials to the burdens of discovery or trial." App. 17a.[4] Finally, and

[4] Pursuant to *Hobson*, the majority claimed that offers of proof of unconstitutional motive "must conform to a higher standard than that generally provided for in the Federal Rules. . . . " App. 13a.

in contradiction of the trial court's stated rationale, the majority found the discovery which had been ordered "impermissible" under *Harlow* because its purpose "was not to establish the factual basis for determining the objective legal reasonableness of Gilley's actions, but to inquire into their motivation." App. 18a. ("[U]nder this court's heightened pleading standard, in order to obtain even limited discovery, such intent must be pleaded with . . . direct as opposed to merely circumstantial evidence of the intent."). App. 14a.

The dissent (Wald, C.J.) zeroed in on the "dilemma" created by the circuit's "heightened-pleading-with-no-discovery" rule:

> "[P]laintiffs are required to adhere to a 'heightened pleading standard' of nonconlusory facts that demonstrate a government official's unconstitutional motive, but they are entirely restricted from obtaining through discovery the information necessary to make that showing."

App. 19a. According to Chief Judge Wald, the standard reflected a "misguided approach to our 'twin goals' of 'limit[ing] the litigation burdens placed on government officials by insubstantial lawsuits' and 'preserving the opportunity for plaintiffs to vindicate constitutional rights.' " App. 20a. Consistent with this view, the dissent stated that instead of "slam[ming] shut this window for discovery through . . . [an] unyielding application of the heightened pleading standard," App. 24a, that is, when "proof of the defendant's motive is peculiarly in the defendant's hands," App. 20a, limited discovery ought to be permitted in order to "preserve a plaintiff's constitutional rights," App. 21a, while simultaneously "enabling

Government officials to avoid the rigors of 'protracted' discovery." App. 21a.

Having to conform its analysis to the circuit's heightened pleading rule, Chief Judge Wald found that although the trial court correctly determined that it was clearly established in late 1985 that plaintiff had a right to a "good faith evaluation," App. 24a, the lower court failed to determine whether his allegations of malice had met the heightened pleading standard. App. 24a. Thus, she found it appropriate to vacate the lower court's denial of the qualified immunity defense, but emphasized that because plaintiff's pleadings contained "the necessary specificity to warrant limited discovery," App. 24a, his case should not be dismissed. Specifically, she noted that the following factors "provided some evidentiary basis for [plaintiff's] contention that Gilley's motives were malicious and unconstitutional":

> 1. Gilley had embarked on a course of making Siegert's professional life at Saint Elizabeths unpleasant because he resented Siegert's a) lengthy medical leave and b) his resistance to Gilley's attempts to alter the Hospital's behavior modification program;
>
> 2. Siegert had a history of excellent job performance ratings until Gilley became his supervisor;
>
> 3. The "extreme" language in Gilley's letter "which inherently casts doubt on the author's neutrality."

App. 24a-25a. Based on these factors, the dissent found that plaintiff could plausibly defeat the qualified immunity defense "if armed with sufficient evidence," App.

24a, and that the trial court "certainly had some basis for permitting a limited inquiry into motive." App. 25a.

On April 16, 1989 plaintiff's petition for rehearing and suggestion for rehearing *en banc* were denied. App. 2a-4a. In her comment accompanying the denial of the *en banc* suggestion, Chief Judge Wald stated that the heightened pleading standard, especially where no discovery is allowed, "raises serious questions of fairness and justification under existing Supreme Court precedent." App. 3a.

Plaintiff filed his petition for a writ of certiorari on July 13, 1990. It was granted on October 15, 1990.

SUMMARY OF ARGUMENT

Whatever term one wants to use to describe a substantive due process violation – "shocking to the conscience," "arbitrary," "abuse of power," or "outrageous" – one occurred here. Because it did, qualified immunity should have been defeated as a defense and rules of pleading and standards of proof should not have been contorted in order to protect a federal official from the consequences of his knowing, malicious, unconstitutional misdeed.

I. Even assuming, without conceding, that the letter which defendant wrote was a solicited, discretionary "reference," plaintiff alleged two constitutional rights which satisfied the *Harlow-Anderson* criteria. First, and independent of malice, he alleged the constitutional right to be free from an official's act which caused a stigma-plus injury. *Paul v. Davis*, 424 U.S. 693 (1976). This right

was clearly established and further particularized in *Doe v. United States Dep't. of Justice*, 753 F.2d 1092 (D.C.Cir. 1985) and *Bartel v. F.A.A.*, 725 F.2d 1403 (D.C.Cir. 1984). Although the facts in *Doe* and *Bartel* are not on "all fours" with plaintiff's, his allegations satisfy *Anderson's* "sufficiently clear" criteria.

Second, plaintiff alleged malice as a part of the constitutional tort which was clearly established in October 1985. That is, he alleged that malice plus injury to his reputation plus injury to his ability to earn a living, that is, the "stigma-plus" test established in *Paul v. Davis*, 424 U.S. 693, 711-712 (1976) – plus malice – was also a clearly established and sufficiently clear right in October 1985. *Hearn v. City of Gainesville*, 688 F.2d 1328, 1332 (11th Cir. 1982).

Because the rights alleged met the *Harlow-Anderson* criteria, defendant's qualified immunity defense should have failed.

II. One of the particularized rights which plaintiff alleged defendant violated, to not have a federal official maliciously sabotage his reputation and career by intentionally publishing false information, includes malice as one of its components. *Wilkes v. Dinsman*, 7 How. 86, 128, 12 L. Ed. 618, 636 (1849); *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972). Plaintiff did not allege just "bare allegations of malice," independent of a clearly established constitutional right, as the plaintiff did in *Harlow*. Rather, he alleged malice along with an established constitutional tort and, therefore, he should have been allowed to proceed with discovery on that and other issues material to his claim.

III. The circuit's insistence that a heightened pleading standard must be applied prior to discovery in a *Bivens* claim where malice has been alleged reflects the worst aspects of pleading under the common law.

Although the Advisory Committee on the Federal Rules had the option of amending Rules 8 and 9 to reflect a heightened pleading standard for civil rights claims where malice has been alleged, that Committee chose to amend Rule 11, for example, and not Rules 8 or 9 in 1983, in order to further discourage frivolous claims. The heightened pleading standard applied at the pre-discovery juncture impermissibly undermines this and other considered decisions of those charged with drafting and amending the Federal Rules.

IV. Discovery is permitted in civil rights suits where immunity has been raised as a defense. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Anderson v. Creighton*, 483 U.S. 635 (1987). But the application of a heightened pleading standard to the allegations of rights asserted *prior* to discovery is just simply wrong. It is only after sufficient discovery has taken place that the application of a heightened pleading standard to a Rule 56 motion is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Prior to discovery and where the parties' claims are different, it is the notice and general pleading standards of Rules 8(a)(2) and 9(b) that must be met. Whether defendant acted with malice, whether the information communicated was false, and whether the act being challenged was discretionary or ministerial demonstrate material differences in the parties' claims, and plaintiff's allegations, including circumstantial allegations of malice, *Village of Arlington Heights v. Metropolitan Housing Development*

Corp., 429 U.S. 266 (1977); *Holland v. United States*, 348 U.S. 121 (1954); *Melton v. City of Oklahoma City*, 879 F.2d 706, 716-17 (10th Cir. 1989); *Springer v. Seaman*, 821 F.2d 871, 879 (1st Cir. 1987); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1255-56 (7th Cir. 1984), more than satisfied the pleading requirements under Rules 8(a)(2) and 9(b). *Conley v. Gibson*, 355 U.S. 41 (1954). Thus, discovery should have proceeded prior to the application of a heightened pleading standard.

V. Assuming that the circuit's heightened pleading standard was appropriately applied pre-discovery, plaintiff's allegations, which must be taken as true, were more than sufficient, including allegations circumstantially showing malice, *Village of Arlington Heights; Holland; Melton; Springer;* and *Bell*, to show even prior to discovery that there were material facts – whether defendant had acted with malice, whether his act was ministerial and whether the communication was false – which were genuinely in dispute and that a reasonable jury could find on the basis of the allegations made that plaintiff should win his case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Therefore, the summary judgment motion should have been denied.

VI. Assuming defendant was engaged in a task within his authorized duties, a material fact was nevertheless in dispute as to whether responding to the Credential Information Request Form was ministerial or discretionary in nature. As plaintiff has asserted, a response to the Form called for a function which was not the product of independent judgment. *Westfall, et al. v. Erwin*, 484 U.S. 292, 296 (1988). On the other hand, defendant claimed that the response called for a discretionary "reference." Whether

defendant acted ministerially or discretionarily was genuinely in dispute, was a material fact and was a condition precedent to the ultimate question as to whether defendant could successfully claim the protection of the qualified immunity defense. *Westfall, et al. v. Erwin*, 484 U.S. at 299-300; *Harlow*, 483 U.S. at 816. Consequently, defendant's summary judgment motion should have been denied. *Westfall*, 484 U.S. at 300.

ARGUMENT

I. ON A SUMMARY JUDGMENT MOTION IN A *BIVENS* CLAIM IN WHICH MALICE HAS BEEN ALLEGED AND WHERE A QUALIFIED IMMUNITY DEFENSE HAS BEEN RAISED, THE CIRCUIT'S HEIGHTENED PLEADING STANDARD WAS INAPPROPRIATELY APPLIED PRIOR TO DISCOVERY.

Generally, government officials performing discretionary functions within the outer perimeters of their duties are shielded from liability if their conduct does not violate clearly established statutory or constitutional rights about which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Formulated in a case in which discovery went on for seven years, the general rule, later narrowed and refined, encompasses the policy that public officials should not be subjected to the costs of trial or to the burdens of broad-reaching discovery, *Harlow*, 457 U.S. at 818, unless:

> " . . . [T]he right the official is alleged to have violated . . . [has] been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected . . . unless the very action in question has previously been held unlawful . . . but it is to say that in the light of preexisting law the unlawfulness must be apparent."

Anderson v. Creighton, 483 U.S. 635, 640 (1987); *Mitchell v. Forsyth*, 472 U.S. 511, 535, n. 12 (1985).

The circuit's heightened standard is a rule of pleading which was inappropriately applied pre-discovery. Even by this standard, however, it is more than apparent that plaintiff alleged clearly established rights which were sufficiently clear so that a reasonable official in defendant's position in October 1985 would have understood what he had done was wrong.

A. THE RIGHTS WHICH PLAINTIFF ALLEGED WERE CLEARLY ESTABLISHED IN OCTOBER 1985.

Even assuming,[5] without conceding, that the act which plaintiff challenged was a subjective, candid response to a solicited request for a reference, plaintiff alleged two clearly established rights protected by substantive due process guarantees.

Independent of malice, plaintiff alleged that he should be constitutionally protected from a federal official who vilified plaintiff's reputation and ruined his professional career. Under *Paul v. Davis*, 424 U.S. 693

[5] But see, *infra*, ¶ II.

(1976), and, more particularly, *Anderson v. Creighton*, 483 U.S. at 640, under *Doe v. United States Dep't. of Justice*, 753 F.2d 1092 (D.C.Cir. 1985) and *Bartel v. F.A.A.*, 725 F.2d 140 (D.C.Cir. 1984), the district court determined that the right plaintiff had asserted was clearly established in October 1985 within the meaning of *Harlow* and *Anderson*. Although the circuit court agreed that *Doe* and *Bartel* established a liberty interest which warranted constitutional protection, App. 16a, the court nevertheless reversed because the "very action in question," *Anderson*, 483 U.S. at 640, which plaintiff had alleged had not "previosuly been held unlawful." *Id.*

In the careful balance struck in *Anderson*, it was established that so long as the "contours of the rights [alleged] are sufficiently clear," *Anderson*, 483 U.S. at 640, and the unlawfulness is "apparent," *id.*, rights will constitutionally be protected if they were clearly established at the time the challenged act took place.

The right plaintiff alleged met the *Anderson* test head-on. In *Bartel*, the defamatory letter at issue was unsolicited, and in *Doe*, the plaintiff was terminated from her job amid claims that she was dishonest and unprofessional. Here, the majority considered that the defamatory letter was a "reference" sent by a past employer in response to a "request" from a future employer. App. 16a. Therefore, what is an insignificant variance in these facts when compared to *Doe's* and *Bartel's* made the contours of the right established in those cases "unclear" in the majority's estimation. The types of factual discrepancies which distinguish plaintiff's case from *Doe's* and *Bartel's*, however, are precisely the kind which *Anderson* warned should not be used in order to protect unlawful official action.

Thus, under *Doe* and *Bartel*, plaintiff's allegations stated a clearly established right which was sufficiently clear to have made it apparent to a reasonable official in defendant's position that what he did was unlawful. *Anderson*, 483 at 640; *Harlow*, 457 U.S. at 817-818. Therefore, defendant's qualified immunity claim should have been denied.

With malice as a part of the constitutional tort asserted, the stigma-plus test established by *Paul v. Davis*, 424 U.S. 693, 711-712 (1976), provides a second basis for plaintiff's claim.

Plaintiff's allegations were sufficiently particularized to state a "stigma-plus" injury which is constitutionally protected. *Paul v. Davis*, 424 U.S. at 711-712. In addition, he alleged not "mere allegations of malice," *Harlow*, 457 U.S. at 817, but rather malice as an element of the underlying constitutional tort which had been established by *Paul* ten years before. *Wilkes v. Dinsman*, 7 How. 86, 128, 12 L. Ed. 618, 636 (1849); *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972); *Paul v. Davis*, 424 U.S. at 711-712; *Hearn v. City of Gainesville*, 688 F.2d 1328, 1332 (11th Cir. 1982).[6] Thus, a stigma-plus, plus malice right which was clearly established in October 1985 served as another basis for denying defendant's qualified immunity claim.

Because each of the rights which plaintiff asserted were clearly established and sufficiently particularized in October 1985, a reasonable official in defendant's position

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[6] Alternatively, this right may be viewed as one which includes malice within the penumbra of the stigma-plus test established by *Paul*.

would have known his act was wrong. Accordingly, defendant should not have been permitted to use the shield of a qualified immunity defense to defeat plaintiff's claim.[7]

B. MALICE IS AN ELEMENT OF A RIGHT PLAINTIFF ALLEGED.

Malice by a federal official is malice, whether in a university, on the high seas, or in public hospitals. Whatever the context, the principle is the same: public employees expect and have a right to fair and honest treatment by officials with more power than they.

The adjustment of the "good faith" defense in *Harlow* did not eliminate malice from constitutional tort litigation. Rather, it was determined that the subjective arm of qualified immunity analysis, *Wood v. Strickland*, 420 U.S. 308, 322 (1975), could no longer be used as an independent basis for suing a federal official. *Harlow*, 457 U.S. at 815-16. Thus, *Harlow* made clear that only *Wood v. Strickland's* objective, "reasonable official" standard could from then on in be applied in order to determine whether a qualified immunity defense could defeat a *Bivens* claim.

Accordingly, where malice is an element of the underlying constitutional tort, as it was in one of the rights plaintiff asserted here, a party is entitled to allege such malice and to obtain discovery with respect to that

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[7] And as the district court observed, rights which may have been established under the provisions of 18 U.S.C. § 1001 also could have served to put a reasonable official in defendant's position on notice that what he was doing was wrong.

and other elements material to that right. Unlike *Harlow*, where the plaintiff alleged "bare allegations of malice," *Harlow* 457 U.S. at 817, in an attempt to defeat qualified immunity where the law was not clearly established, the plaintiff here alleged malice along with a clearly established right.

That malice may be a part of a right which may defeat an immunity claim was recognized more than a century ago. In 1836, on board a ship in service to the United States Navy, a marine had been thrown into the ship's brig, had been lashed, had been shackled and had otherwise been punished for refusing to follow orders when he thought, wrongly, that his enlistment time was up. Several years later, upon returning to the mainland, he sued his commanding officer for assault and other torts, none of which contained allegations of malice. The captain raised, as his defense, official immunity. On a writ of error it was held:

> " . . . [I]n respect to those compulsory duties . . . while arduously endeavoring to perform them in such a manner as might advance the science and commerce and glory of his country, rather than his own personal designs, a public officer, invested with certain discretionary powers, never has been, and never should be, made answerable for any injury, when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty."

Wilkes v. Dinsman, 7 How. 86, 128, 12 L. Ed. 618, 636 (1849).

If malice had been alleged, *Wilkes* would have otherwise been decided. *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972); *Perry v. F.B.I.*, 781 F.2d 1294, 1304 (7th Cir.

1986) (concurring opinion, Posner, J.) (the qualified privilege is forfeited if the defendant acts in bad faith); *Richardson v. Chevrefils*, 552 A.2d 89, 94-96 (N.H. 1988). Thus, where malice is asserted as a part of a right which is established and clear and constitutionally protected, a claim of qualified immunity must be denied.

C. THE HEIGHTENED PLEADING STANDARD WAS INAPPROPRIATELY APPLIED PRIOR TO DISCOVERY.

By its very terms, and as it has been interpreted, Rule 56 provides that prior to final disposition on a summary judgment motion appropriate discovery should have taken place, including in civil rights claims, *Mitchell v. Forsyth*, 472 U.S. at 526 (. . . the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue. . . . "); *Anderson v. Creighton*, 483 U.S. 646-647, n. 6 (" . . . if the actions Anderson claims he took are different from those the Creightons allege . . . then discovery may be necessary before Anderson's motion for summary judgment on qualified immunity grounds can be resolved."), and particularly when state of mind is at issue. Wright & Miller & Kane, Federal Practice & Procedure: Civil 2d § 2730 (1983) ("Since the information relating to state of mind generally is within the exclusive knowledge of one of the litigants and can be evaluated only on the basis of circumstantial evidence, the other parties normally should have an opportunity to engage in discovery before a summary judgment is rendered. . . . "). Therefore, where the parties have had the opportunity to conduct discovery, a heightened pleading standard is appropriate. *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 256-257 (1986). Until discovery has taken place, however, and where the parties' claims are different, the pleadings must be measured against the notice and pleading requirements of Rules 8(a)(2) and 9(b) in order to withstand dismissal.

That plaintiff's and defendant's positions are different cannot be denied. Defendant claims that the act being challenged was discretionary but plaintiff claims it was ministerial; plaintiff claimed that defendant acted with malice but defendant implied he did not; and plaintiff asserted that the statement was false but defendant implied it was true. Thus, since the parties' claims conflict and since discovery had not taken place, pleading standards of Rules 8(a)(2) and 9(b), and not of Rule 56, should have been applied.

D. PLAINTIFF'S ALLEGATIONS MET THE APPROPRIATE PRE-DISCOVERY PLEADING STANDARDS OF RULES 8(a)(2) AND 9(b).

The objective of the provisions of Rule 8, the "keystone" of the system of pleading embodied in the federal rules, is to give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. *Conley v. Gibson*, 355 U.S. 41, 47 (1957); Wright & Miller, Federal Practice & Procedure: Civil 2d §§ 1201, 1202 (1990). Despite occasional concerted efforts to alter the Rule's "notice" pleading requirement to one of "fact," its terms have remained substantially the same since 1938. In 1955, for example, the Advisory Committee on the Federal Rules prepared a Note, *Nagler v. Admiral Corp.*, 248

F.2d 319, 324 (2d Cir. 1957), which shows that the Committee "definitively" rejected all suggestions requiring use of the concept of "facts" and "causes of action" in connection with the pleading process. Wright & Miller, Federal Practice & Procedure: Civil 2d § 1201 (1990). Thus, the language of the Rule has not changed and its meaning has not altered since its inception. *Conley v. Gibson*, 355 U.S. at 47; *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); Wright & Miller, Federal Practice & Procedure: Civil 2d § 1201, n. 11 (1990).

Rule 9(b) was "very probably," *Love v. Commercial Casualty Co.*, 26 F. Supp. 481, 482 (D.C.Miss. 1939), based on Order xix, Rule 22, Supreme Court of England. *Sargeaunt v. Cardiff Junction Dry Dock Co., Ltd.*, The Weekly Notes, 263 (August 14, 1926). Order xix, Rule 22, a general pleading provision, was subsequently amended, so that in England, malice and other conditions of the mind, like fraud, must now be pleaded with particularity. Wright & Miller, Federal Practice & Procedure: Civil 2d § 1300, n. 2 (1990).

Rule 9(b) can only be read in combination with Rule 8(a)(2), Wright & Miller, Federal Practice & Procedure: Civil 2d § 1298 (1990), but even on its own, its meaning is crystal clear: when "malice, intent, knowledge and other condition of mind" are pleaded, they may be generally alleged "as a fact without setting out the circumstances from which it is to be inferred." 25 Halsbury's Law of England, 2d Edition 277.

With undoubted knowledge of the amendment to England's Rule 9(b) counterpart, being aware of the problem that frivolous lawsuits have created, and having had ample

opportunity to amend the rules to require pre-discovery heightened pleading standards for civil rights claims where malice is alleged, the Advisory Committees on the Federal Rules nevertheless have left Rules 8 and 9 intact.[8]

Although plaintiff could have alleged malice merely in notice and general pleading terms, he in fact alleged far more. ¶ I. E., *infra*. Thus, his assertions were more than adequate to meet the Rule 8(a)(2) and 9(b) requirements that he state in notice and general pleading terms the basis of his claim for relief. *Conley v. Gibson*, 355 U.S. at 47. Therefore, plaintiff's case should not have been dismissed. Rather, unencumbered by an inappropriately applied rule of pleading, discovery consistent with the nature of plaintiff's claim should have been allowed to proceed. *Mitchell v. Forsyth*, 472 U.S. at 526; *Anderson v. Creighton*, 483 U.S. at 646-647, n. 6.

E. ASSUMING THAT THE CIRCUIT'S HEIGHTENED-PLEADING-WITH-NO-DISCOVERY STANDARD WAS APPROPRIATELY APPLIED, PLAINTIFF'S ALLEGATIONS SUFFICIENTLY SATISFIED THAT STANDARD EVEN PRIOR TO DISCOVERY.

Plaintiff alleged sufficient facts, even prior to discovery, to comply with a heightened pleading standard which must be met when opposing a Rule 56 motion,

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[8] In 1983, for example, and to discourage frivolous lawsuits, the Advisory Committee on the Federal Rules chose to amend Rule 11, and not Rules 8 and 9.

Anderson v. Liberty Lobby, Inc., 477 U.S. at 248, and plaintiff's allegations were more than sufficient so that a reasonable jury could have returned a verdict for him. *Id.*

In his complaint and in opposition documents, plaintiff alleged that defendant's statement was false, that he had acted outside of the outer perimeters of his authority in "responding" to the Form and that the task defendant should have performed was purely ministerial in nature. His circumstantial allegations of malice, which must be viewed no differently than allegations which are direct, *Holland v. United States*, 348 U.S. 121, 139-140 (1954); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) (constitutionally impermissible motivations may be established by circumstantial evidence); *American Communications Ass'n. v. Douds*, 339 U.S. 382, 411 (1950) (circumstantial evidence may be indispensable because it is unlikely that direct evidence of state of mind will be available), were also sufficient to satisfy the heightened pleading rule. See also *Melton v. City of Oklahoma City*, 879 F.2d 706, 716-17 (10th Cir. 1989) (in *Bivens* claims, circumstantial evidence may be used to prove state of mind); *Springer v. Seaman*, 821 F.2d 871, 879 (1st Cir. 1987) (same); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1255-56 (7th Cir. 1984) (same).

Defendant claimed plaintiff was "inept;" plaintiff alleged he had always received exemplary evaluations at Saint Elizabeths. On this issue alone, and taking plaintiff's allegations as true, a reasonable jury could justifiably infer and reasonably conclude that defendant had acted maliciously. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255; App. 24a-25a.

Plaintiff also made other allegations from which a reasonable jury could infer malice:

1. Defendant failed to respond to what the Form actually requested.

2. The language defendant used was "extreme" which "inherently casts doubt on defendant's neutrality." App. 24a-25a.

3. Plaintiff alleged that there were conflicts with defendant as to how the behavior modification program should be run. App. 24a-25a.

4. Plaintiff alleged that defendant resented plaintiff's absence for several months. App. 24a-25a.

Taken together, plaintiff's allegations, including those of malice, satisfied a heightened standard of pleading which shows that there were material facts genuinely at issue and that a reasonable jury could find defendant liable. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248. Therefore, defendant's motion for summary judgment should have been denied.

II. A FEDERAL OFFICIAL MAY NOT BE ENTITLED TO QUALIFIED IMMUNITY WITHOUT REGARD TO WHETHER THE CHALLENGED CONDUCT WAS DISCRETIONARY IN NATURE.

In its February 1989 opinion, the majority determined that it was irrelevant to the issue of qualified immunity whether the "evaluation sought . . . was 'subjective' or 'objective,' App. 16a, that is, whether it was ministerial or discretionary in nature. The majority's view is erroneous. Whether a qualified immunity defense has merit depends not only upon whether an official acted within the scope of his duties. A finding must also be made to ascertain

whether the conduct itself was discretionary. *Westfall, et al. v. Erwin*, 484 U.S. at 295; *Harlow*, 457 U.S. at 816, 818.

Assuming, without conceding, that the defendant was acting within the outer perimeters of his duties, whether an official's act is ministerial or discretionary depends upon the nature of the function the official was asked to perform. *Westfall*, 484 U.S. at 296, n. 3; *Forrester v. White*, 484 U.S. 224, (1988); *Harlow*, 457 U.S. at 810-813. Thus, when the function an official is asked to perform is not the product of independent judgment, the act is deemed to be ministerial. Therefore, the act is not protected by qualified immunity. *Westfall*, 484 U.S. at 296-97.

Saint Elizabeths was asked to respond to a Credential Information Request Form. Signed by plaintiff, the Form authorized the release of "all information on job performance and credentials," terms of bureaucratic art, and information which was discreet and already in existence. Thus, the "level of discretion," *Westfall*, 484 U.S. at 297, involved in responding to the Form was nil. For each of the years during which plaintiff had been employed at Saint Elizabeths he had received periodic job performance ratings of particular evaluative gradations. His personnel file also contained documents noting the privileges or "credentials" he had received as a psychologist. Therefore, responding to the Form involved a purely administrative function of locating, copying and sending documents referred to by the Form.

Whether defendant enjoyed qualified immunity from suit for the performance of this function is to some degree dependent upon whether Army personnel would be immune from suit when it "ordered" the information for

its records. *Westfall*, 484 U.S. at 297, citing *Doe v. McMillan*, 412 U.S. 306, 323-24 (1973). Ordering the information as opposed to evaluating it once it was received was an act which involved no discretion whatever. Responding to the Form by sending documents to which it referred took a similar, and less than minimal, level of discretion. At most, someone may have had to exercise "some modicum of choice," *Westfall*, 484 U.S. at 298, in ministerially locating the job performance ratings and credentialing documents in plaintiff's file, not what to discretionarily state in those documents.

In opposition to defendant's motion, plaintiff argued that responding to the Form was a ministerial task. May 6, 1987 Memorandum of Points and Authorities In Support of Plaintiff's Opposition To Defendant's Motion To Dismiss or Alternatively For Summary Judgment, at 7-8. He also alleged that defendant was a "low-level, non-policy-making supervisor." J.A. 18. Defendant, on the other hand, urged that a response to the Form called for a subjective, discretionary "reference." J.A. 12.

Therefore, defendant's motion should have been denied since a material fact, whether defendant's act was discretionary or ministerial, was genuinely in dispute. *Westfall*, 484 U.S. at 299.

CONCLUSION

On a summary judgment motion where qualified immunity has been raised as a defense, the circuit's heightened-pleading-with-no-discovery standard should not be permitted to thwart appropriately pleaded *Bivens* claims where malice is alleged, and whether a challenged act is discretionary may not be disregarded prior to determining whether a federal official is qualifiedly immune from suit.

Accordingly, the judgment of the court of appeals should be reversed with instructions to remand the case to the district court for discovery and trial on the merits.

Respectfully submitted,

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No. 90-96

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

FREDERICK A. SIEGERT,

Petitioner

v.

H. MELVYN GILLEY,

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX

CONSTITUTIONAL PROVISION AND RULES INVOLVED

Fifth Amendment, United States Constitution:

> No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, in the militia, when in actual service in time of war or public danger; nor shall any person be subject

for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 8, Federal Rules of Civil Procedure. General Rules of Pleading:

(a) Claims For Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs

or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader, does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure To Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be Concise and Direct; Consistency. (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one

of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of the consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Rule 9, Federal Rules of Civil Procedure. Pleading Special Matters:

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have

occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasijudicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.

(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h).

Rule 56. Summary Judgment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together, with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain

what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party's response may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may

order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the Court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney my [sic] be adjudged guilty of contempt.